Nos. 17-1717 & 18-18

IN THE

Supreme Court of the United States

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION,
Petitioner,

v.

AMERICAN HUMANIST ASSOCIATION, ET AL.,
Respondents.

THE AMERICAN LEGION, ET AL.,
Petitioners,

v.

AMERICAN HUMANIST ASSOCIATION, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF MEDAL OF HONOR RECIPIENTS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

Hershel Woodrow Williams, Charles S. Kettles, Robert Roland Ingram, and Allen James Lynch (collectively, "the Medal of Honor recipients") have a strong interest in this case because they are among the rarest of veterans. They are each recipients of the Medal of Honor. These men have lifelong commitments to honoring the history and memory of fallen American servicemen, a mission that is threatened by the Fourth Circuit.

The Medal of Honor is the highest military decoration that can be given by the United States to a member of the armed forces. It is awarded by the President of the United States "to a person who, while a member of [the armed forces], distinguished himself conspicuously by gallantry and intrepidity at the risk of his life above and beyond the call of duty." 10 U.S.C. § 3741 (Army); *see also id.* § 6248 (Navy, Marine Corps, and Coast Guard), *id.* § 8741 (Air Force). In the nation's history, the Medal of Honor has only been awarded approximately 3,500 times,

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amici curiae, or their counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief, either by express written consent or by filing a letter documenting consent with the Court.

including more than 600 posthumous awards. *Medal of Honor Statistics,* The United States Army, https://www.army.mil/medalofhonor/statistics.html (last visited Dec.18, 2018). There are presently 74 living Medal of Honor recipients. *Living Recipients*, Congressional Medal of Honor Society, http://www.cmohs.org/living-recipients.php (last visited Dec. 18, 2018). Medals of Honor have been awarded to heroes of diverse religious creeds, reflecting that throughout the nation's history, veterans have come from all religions (or none at all).

The Medal of Honor recipients are American heroes who have repeatedly answered the call of duty throughout their lives. All have lost brothers-in-arms and understand firsthand the sacrifices of all veterans. The Medal of Honor recipients thus have unique appreciations for, and insights on, the historical and communal values of veterans memorials—something the Fourth Circuit lacked in rendering the judgment below.

The Medal of Honor recipients are profoundly troubled by this case. Properly understood, veterans memorials are primarily secular displays that honor fallen heroes and unite communities with shared values of patriotism and remembrance—not improper government endorsements of religion. Unless the judgment of the Fourth Circuit is reversed, the Bladensburg Peace Cross (and countless other memorials) will be endangered. Even if the Bladensburg Peace Cross is not completely removed

or dismembered, the Fourth Circuit's decision will impede the future ability of state and local governments to maintain war memorials, leading to their inevitable deterioration and decay.

The Medal of Honor recipients' interest in this case also stems from the fact that one of their brethren—Medal of Honor recipient Henry Hulbert—is among the deceased veterans honored on the plaque at the Bladensburg Peace Cross. *World War I Memorial Cross (Peace Cross) Plaque, Bladensburg, Prince George's County, Maryland, April 1975*, Digital Md., http://collections.digitalmaryland.org/cdm/ref/collection/pgjw/id/551 (last visited Dec. 18, 2018); *Henry Lewis Hulbert*, Congressional Medal of Honor Society, http://www.cmohs.org/recipient-detail/2236/hulbert-henry-lewis.php (last visited Dec. 18, 2018).

Messrs. Williams, Kettles, Ingram, and Lynch each have unique stories of valor, endurance, courage, and dedication, which are recounted below. But woven through each of their stories is a common thread of patriotism and service. They have all devoted considerable time to veterans' causes and care deeply about civic education, preserving history, and remembering fallen servicemen.

1. Chief Warrant Officer Hershel Woodrow Williams

Hershel Woodrow "Woody" Williams was born on October 2, 1923, in Quiet Dell, West Virginia, and received the Medal of Honor on October 5, 1945, for his valiant and selfless conduct during the Battle of Iwo Jima in World War II. *See Hershel Woodrow Williams*, Congressional Medal of Honor Society, http://www.cmohs.org/recipient-detail/3066/williams-hershel-woodrow.php (last visited Dec. 18, 2018). Williams, at that time a Corporal, was assigned to the 21st Marine Regiment, 3d Marine Division. Near the beginning of the five-week battle, Cpl. Williams volunteered to assist American tanks open a lane through a heavily fortified area of reinforced concrete pillboxes. Covered by only four riflemen, Cpl. Williams single-handedly attacked the individual pillbox fortifications with a flamethrower, reducing the machine-gun fire being leveled at the American troops. *Id.* Under heavy fire and frequently at the rear of the hostile forces, Cpl. Williams neutralized seven fortifications, running back and forth to his own lines to prepare demolition charges and trade out spent flamethrowers. At one point, he crept close enough to a fortified pillbox to jam the nozzle of his flamethrower into one of the pillbox's embrasures. During the attack, he was also charged by enemy riflemen with bayonets, whom he repelled with his flamethrower. *Id.* After four hours of harrowing work, the enemy line was broken, and the American troops were able to advance. *See Medal of Honor*

Recipient Hershel "Woody" Williams Interview, Pritzker Military Museum & Library (Jan. 24, 2008, 6:00 PM), https://www.pritzkermilitary.org/whats_on/medal-honor/medal-honor-recipient-hershel-woody-williams-interview/ (last visited Dec. 18, 2018).

Williams is the only surviving Marine to have received the Medal of Honor for service during the Second World War and is the only surviving honoree from the Pacific theater. Following World War II, Williams continued his service in the Marine Corps, receiving an honorable retirement after approximately seventeen years of service. Williams also served as the chaplain of the Congressional Medal of Honor Society for thirty-five years. In 2010, Williams founded the Hershel Woody Williams Medal of Honor Foundation, a not-for-profit organization that establishes permanent memorials and provides scholarships for Gold Star families and children who have lost loved ones in military service.

The Foundation promotes and builds monuments to recognize the families of fallen service members, preserve the memory of the fallen, and remind communities of the high cost of freedom. Each monument displays the Gold Star, recognizing the families who lost a loved one in service, and four vignettes depicting scenes of homeland, family, patriotism, and sacrifice. *Monument Overview*, Hershel Woody Williams Medal of Honor Foundation, http://hwwmohf.org/monument-overview.html (last

visited Dec. 18, 2018). The first monument was unveiled in 2013, one of the first monuments in the country to recognize the families of fallen service members. As of today, Williams and his foundation are responsible for establishing thirty-nine Gold Star Families memorials across the United States, with forty more memorial monuments underway, in thirty-seven states. *See Memorial Monuments*, Hershel Woody Williams Medal of Honor Foundation, http://hwwmohf.org/monument-projects.html (last visited Dec. 18, 2018).

2. Lieutenant Colonel Charles S. Kettles

Charles S. Kettles was born in Ypsilanti, Michigan, on January 9, 1930. His father—an immigrant—had enlisted as a pilot for the United States the day after the Japanese bombed Pearl Harbor. Kettles followed in his father's footsteps. In 1951, he was drafted into the Army. He became a commissioned officer and served tours as a pilot in Korea, Japan, and Thailand before returning home to Michigan in 1956. But his service to his country was not over. He remained an Army reservist even as he opened a Ford dealership with his brother. *See Lieutenant Colonel Charles Kettles Medal of Honor Vietnam War*, Army.Mil Features, https://www.army.mil/medalofhonor/kettles/ (last visited Dec. 18, 2018). (hereinafter "*Medal of Honor*")

In 1963, Kettles returned to active duty, answering a call for pilots to support the war in Vietnam. *Id.* He became trained to fly the famed UH-1D Huey helicopter and joined a newly formed helicopter unit as a flight commander.

Kettles found himself in Vietnam on May 15, 1967. That morning, he learned that the 101st Airborne Infantry unit had been ambushed by North Vietnamese guerrilla fighters and was trapped in a riverbed, taking heavy fire. Kettles immediately volunteered to lead a flight of six Huey helicopters to bring reinforcements and evacuate the wounded. *Id.* When he reached the landing zone for the first time that day, he saw a wall of green enemy tracers coming at him. Neither Kettles nor the men he was leading had ever seen fire so intense. *See Remarks by the President at Presentation to Lieutenant Colonel (Ret.) Charles Kettles, U.S. Army*, The White House (July 18, 2016) https://obamawhitehouse.archives.gov/the-press-office/2016/07/18/remarks-president-presentation-lieutenant-colonel-ret-charles-kettles-us (last visited Dec. 18, 2018) (hereinafter "*Presidential Remarks*"). Kettles landed his helicopter and remained exposed long enough to collect the wounded in the face of danger. He brought them to safety.

Kettles returned to the combat scene with additional reinforcements and landed again amid heavy enemy fire. His helicopter sustained heavy damage and began leaking fuel, but he nursed it back

to base. And then he found a different helicopter and went back for a third time to evacuate 44 remaining soldiers. He refused to depart until told that all personnel were onboard. But once airborne, he was informed that eight troops—the rearguard who had provided cover during the extraction—remained stranded by the intense enemy fire. Kettles knew that if those eight soldiers were left behind, they would die. *Id.* Disregarding his own safety, he went back for them—a lone helicopter returning to battle without any cover or support. As soon as he landed, a mortar round shattered both windshields. Shrapnel ripped through the cockpit, tearing into Kettles's seat. *Id.* Still he remained until all eight remaining troops made it safely on board. By the time they did, the helicopter was badly damaged. It was carrying thirteen servicemen. And it was 600 pounds over its weight limit. Somehow the helicopter managed to take off, but another mortar hit the helicopter shortly after it went airborne. It fishtailed violently, throwing a soldier from the cabin to cling to a skid as Kettles flew the soldiers in his charge to safety. *Id.*

Kettles returned to the United States in 1970 to live a model American life. *See Medal of Honor, supra.* He has ten children. He and his wife Ann celebrated forty years of marriage. He taught aviation at Eastern Michigan University and served on his town's city council. *See Presidential Remarks, supra.* Nearly half a century went by before Kettles received the Medal of Honor for his conspicuous gallantry and intrepidity in going back, not once, not

twice, but four times for his comrades at the risk of his own life and beyond the call of duty. When he learned he would be receiving the military's highest honor, Kettles said it "seems like a hell of a fuss over something that happened 50 years ago." *Id.* But as President Obama noted at the award ceremony, the "hubbub" was well-earned. Kettles's story was a reminder of "the goodness and decency of the American people, and the way that we can all look out for each other, even when times are tough, even when the odds are against us." *Id.*

3. Hospital Corpsman Third Class Robert Roland Ingram

Robert Roland Ingram was born January 20, 1945, in Clearwater, Florida, and was awarded the Medal of Honor on July 10, 1998, for his extraordinary heroism during an attack in Quang Ngai Province, South Vietnam on March 28, 1966. *See Remarks by the President in Presentation of the Medal of Honor on Robert R. Ingram*, White House Office of the Press Secretary (July 10, 1998), https://clintonwhitehouse4.archives.gov/WH/New/html/19980710-92.html (last visited Dec. 18, 2018) (hereinafter "*Ingram Presidential Remarks*").

Ingram joined the Navy in 1963 at the age of 18, with an aviation electronics guarantee. *Interview with Robert Ingram*, Veterans History Project, http://memory.loc.gov/diglib/vhp/story/loc.natlib.afc2001001.89697/transcript?ID=mv0001 (last visited

Dec. 18, 2018) (hereinafter "Interview with Robert Ingram). After catching pneumonia, however, Ingram witnessed a spinal meningitis outbreak and was impressed by the selfless actions of the hospital corpsmen. *Id.* Following this experience, Ingram attended Hospital Corps School, and went to Vietnam with Company C (Charlie Company), 1st Battalion, 7th Marines, in July 1965. *Id.*; *Ingram Presidential Remarks, supra.*

A fully staffed unit when it landed in Vietnam, Charlie Company had fewer than 115 men on March 28, 1966. *Interview with Robert Ingram, supra.* Ingram, a 21-year-old Petty Officer at the time, accompanied the point platoon as Charlie Company was unexpectedly attacked by 100 North Vietnamese Aggressors. *Ingram Presidential Remarks, supra.* Enemy fire lacerated a tree line, decimating the platoon in moments. *Id.* Oblivious to the danger, Ingram crossed the battlefield to reach a downed Marine. *Id.* As Ingram administered aid, he was shot in the hand. *Id.* Despite his own injury, Ingram continued to traverse the fire-swept landscape to assist the wounded, sustaining additional gunshots to his knee and a close-range bullet to the head. *Interview with Robert Ingram, supra.* Deaf and partly blinded, Ingram killed the Vietnamese soldier who shot him at close range and continued collecting ammunition from dead soldiers to use against the enemy. *Id.* Ingram sustained his fourth gunshot wound while dressing the head wound of another corpsman. *Id.*

Although he endured extreme pain from his injuries and faced the possibility of his own death, Ingram continued to doctor Marines for several additional hours. *Id.* He tried to refuse evacuation, insisting that other Marines should be evacuated first. *Ingram Presidential Remarks, supra.* By the time Ingram was pulled to safety, his vital signs were so low that he was tagged "killed in action" and placed in a dead pile. *Id.* After an eight-month recovery period, Ingram went back to sea on another deployment, and was eventually discharged from the Navy in 1968. *Robert Roland Ingram*, The U.S. Navy Memorial, http://navylog.navymemorial.org/ingram-robert-1 (last visited Dec. 18, 2018) (hereinafter "Robert Roland Ingram"). Following his discharge, Ingram enrolled in college to pursue a nursing degree and worked as a registered nurse at a family practice in Florida. *Id.* He later married and raised two children. Although the original Medal of Honor nomination for HM3 Ingram had been lost, Ingram's unit worked tirelessly to ensure that he received his deserved recognition. *Ingram Presidential Remarks, supra.* In 1998, thirty-two years after his heroism, Ingram became the first Navy veteran in twenty years to receive the Medal of Honor. *Robert Roland Ingram, supra.*

4. Sergeant Allen James Lynch

Allen James Lynch was born October 28, 1945, in Chicago, Illinois, and received the Medal of Honor on May 14, 1970, for "conspicuous gallantry and

intrepidity in action" during a Dec. 15, 1967 enemy attack on his unit near the village of My An, in Vietnam's Binh Dinh Province. *Allen James Lynch*, Congressional Medal of Honor Society, http://www.cmohs.org/recipient-detail/3350/lynch-allen-james.php (last visited Dec. 18, 2018).

At the time of the attack, Lynch was a 22-year-old Specialist 4th Class serving as a radio telephone operator with the 12th Cavalry's Company D, 1st Battalion. *Id.*; *Medal of Honor Recipient Allen J. Lynch Interview (#1)*, Pritzker Military Museum & Library (Apr. 14, 2004), http://www.pritzkermilitary.org/whats_on/medal-honor/medal-honor-recipient-allen-j-lynch-interview-number-1/ (last visited Dec. 18, 2018) (hereinafter "*Pritzker Interview*"). Lynch's unit had been in the field experiencing near-daily enemy contact for about a month and was pulled back for an "in-country stand down" to rest and recharge. *Id.* at 20:18. Shortly after being pulled back, however, the unit received word that another unit had been ambushed and needed assistance. *Id.* at 20:33. Lynch's unit joined them via air assault to assist, only to be ambushed themselves. *Id.* at 21:15.

In the ensuing firefight, Lynch spotted three fellow soldiers lying on the ground, wounded and exposed. *Allen James Lynch*, U.S. Army Medal of Honor, https://www.army.mil/medalofhonor/citations25.html#L (last visited Dec. 18, 2018) (hereinafter "*Lynch*

Medal of Honor"). Lynch ran 50 meters through heavy enemy fire to administer aid, then returned to the open field three times to carry each soldier to a nearby trench for safety. *Id.* When his unit was forced to withdraw, Lynch stayed with the wounded men, defending the trench alone for two hours with only his rifle and a grenade. *Id.* He then crossed 70 meters of open terrain—five times—to move the soldiers to a more secure area. *Id.* Finally, he was able to contact another friendly company that had joined the fight, and he assisted in directing the attack and evacuating the wounded men. *Id.* Lynch was granted the Medal of Honor for his actions "at the risk of his life above and beyond the call of duty." *Id.*

After leaving active duty in April 1969, Lynch continued to serve his country. He served in the U.S. Army reserves from 1972-1985 and in the U.S. Army National Guard from 1985-1994, retiring as a First Sergeant. *Pritzker Interview* at 1:05. In 1970, Lynch went to work for the Veterans Administration, and in 1985 he became chief of the Veterans Rights Bureau for the Illinois Attorney General's office. *Id.* at 1:43. Lynch also started the Allen J. Lynch Medal of Honor Veterans Foundation, a charitable organization that provides temporary financial assistance to veterans and their families. *Allen J. Lynch to be awarded the DAR Distinguished Citizen Medal by North Shore Chapter, Lake Forest, Illinois-National Society Daughters of the American Revolution, Deerfield Review*, Feb. 7, 2018, http://www.chicagotribune.com/suburbs/deerfield/co

mmunity/chi-ugc-article-allen-j-lynch-to-be-awarded-the-dar-distingu-2018-02-07-story.html (last visited Dec. 18, 2018).

Now retired, Lynch continues to volunteer with the Vietnam Veterans of America, serves as a liaison for the Congressional Medal of Honor Society, and gives speeches for military-related events and for other audiences. *Id.*

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Bladensburg Peace Cross has stood since 1925 as a tribute to 49 veterans from Prince George's County, Maryland who lost their lives during World War I. It symbolizes national and local unity, shared remembrance, and patriotism. Nothing in the memorial itself, let alone its routine maintenance or public usage, violates the Establishment Clause. The Medal of Honor recipients thus fully support the arguments raised by the American Legion and Maryland-National Capital Park and Planning Commission.

The judgment of the Fourth Circuit should be reversed. The Fourth Circuit's decision turns the Establishment Clause upside down by crediting generalized objections to religious symbols over the specific history and secular meaning of a longstanding war memorial. Even if Respondents' objections to the Peace Cross are taken at face value, "an Establishment Clause violation is not made out

any time a person experiences a sense of affront." *Town of Greece, N.Y. v. Galloway*, 572 U.S. 565, 588-89 (2014).

Contrary to the decision below, building and maintaining veterans memorials, including those that incorporate religious imagery, is consistent with the nation's longstanding "historical practices and understandings." *Id.* at 576 (quoting *Cty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 670 (1989)). From 1919 until 1942 (*i.e.*, the period in which the Bladensburg Peace Cross was constructed and then stood for almost two decades after), Medals of Honor given to members of the Navy, Marine Corps, and Coast Guard for certain acts of heroism were in the shape of a cross. *History*, Congressional Medal of Honor Society, http://www.cmohs.org/medal-history.php (last visited Dec. 18, 2018). Other medals also incorporate religious imagery, as discussed below. And the inscriptions on the Bladensburg Peace Cross—"valor, endurance, courage, and devotion" (App. 42a)—mimic language routinely used in Medal of Honor commendations. These otherwise religious symbols convey secular messages when used in war memorials.

ARGUMENT

I. The Fourth Circuit's Decision, Unless Reversed, Endangers Veterans Memorials Around the Country

The panel majority below held that the Bladensburg Peace Cross—a monument "established in memory of soldiers who died in World War I" as "part of a memorial park honoring veterans in Bladensburg" adjacent to the "Star-Spangled Banner National Historical Trail"—was not a patriotic display or veterans memorial but instead "has the primary effect of endorsing religion." App. 3a, 6a. (internal quotation marks omitted). The Fourth Circuit's dismissive treatment of the Bladensburg Peace Cross as a "purported war memorial," App. 3a, sends an unmistakable message of casual indifference to war memorials. If not reversed, the decision below threatens the existence of a longstanding monument that honors one of the Medal of Honor recipients' fallen brethren, puts other memorials at risk, and sends a message of callous disregard for the sacrifices of veterans.

A. The Fourth Circuit's Decision Conflicts with Precedent

This Court has long acknowledged the secular messages of war memorials. In *Buono*, the Court observed that an unadorned Latin cross placed in the desert as a war memorial was "not merely a reaffirmation of Christian beliefs" but also "a symbol

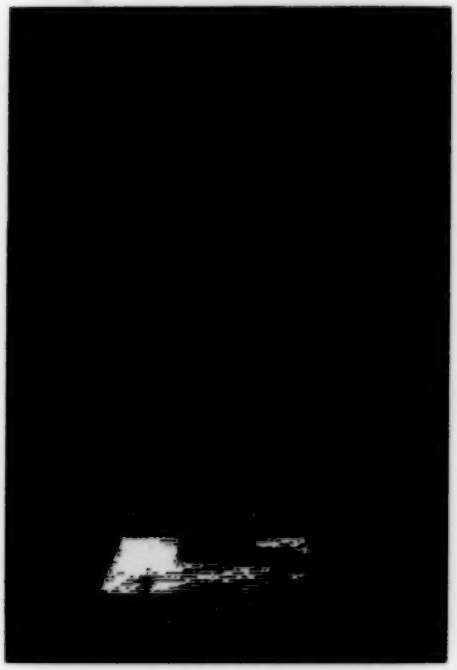
often used to honor and respect those whose heroic acts, noble contributions, and patient striving help secure an honored place in history for this Nation and its people." *Salazar v. Buono*, 559 U.S. 700, 721 (2010); *see also Mount Soledad Mem'l Ass'n v. Trunk*, 567 U.S. 944, 944-45 (2012) (Alito, J., respecting the denial of certiorari); *Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 565 U.S. 994, 1007-08 (2011) (Thomas, J., dissenting from denial of certiorari); *cf. Van Orden v. Perry*, 545 U.S. 677, 689-90, 692 (2005) (recognizing the dual religious and historical significance of a Ten Commandments memorial). The Fourth Circuit's decision here conflicts with this recognition. The Medal of Honor recipients urge the Court here to reaffirm the law and common sense.

Because displays incorporating religious symbols can carry multiple meanings, courts should avoid finding "an Establishment Clause violation . . . any time a person experiences a sense of affront." *Town of Greece*, 572 U.S. at 589. Yet that is precisely what the Fourth Circuit did here, yielding to the demands of three residents who claim to "have faced multiple instances of unwelcome contact with the Cross" "while driving in the area," leaving them "offended." App. 7a. The Fourth Circuit's approach strays from the underpinnings of the Establishment Clause. The Establishment Clause has historically served to prevent coerced religious adherence, not to save passersby from seeing a display they find disagreeable. "Offense . . . does not equate to coercion." *Town of Greece*, 572 U.S. at 589.

The mere existence of religious imagery, particularly in the context of an otherwise secular memorial, is not coercion. To forbid religious imagery in all secular displays and memorials is itself coercive and an affront. "Government may not mandate a civic religion that stifles any but the most generic reference to the sacred." *Id.* at 581. Yet that again is what the Fourth Circuit did here, finding that "[w]hile the Latin cross may generally serve as a symbol of death and memorialization, it only holds value . . . because of its affiliation with the crucifixion of Jesus Christ." App. 18a.

B. Holding that the Peace Cross Is Anything Other Than a War Memorial Is an Affront to Veterans and Endangers Other Monuments

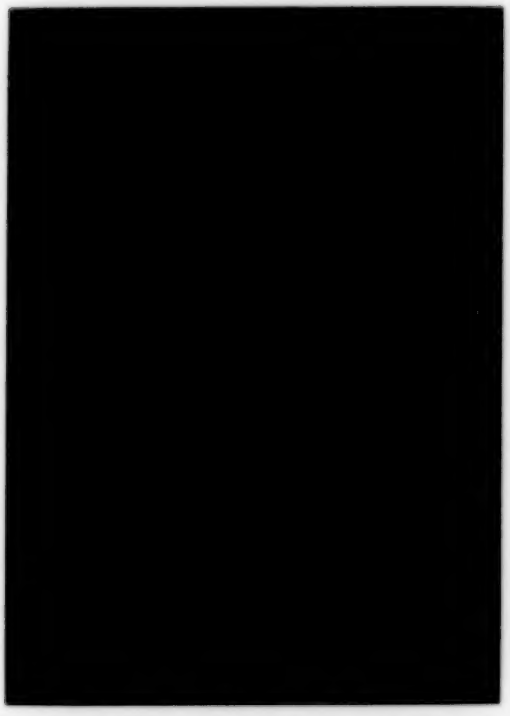
Other veterans memorials will be endangered if the Fourth Circuit's decision is not reversed. Memorials that display a cross—such as the Argonne Cross at Arlington National Cemetery commemorating the American soldiers who died in France during World War I (pictured below), the Irish Brigade Monument at Gettysburg National Military Park, the Vietnam War Memorial at La Mesa, California, or the memorial in Taos, New Mexico commemorating servicemen who endured the Bataan Death March—will be subject to suit, removal, or defacement under the logic of the Fourth Circuit's decision.



Picture of the Argonne Cross

Although the panel majority "note[s] that [its] opinion does not presuppose any particular result (i.e., removing the arms or razing the Cross entirely)," App. 29a n.19, its logic ordains such a result, which is exactly what Respondents seek: "removal or demolition of the Cross, or removal of the arms from the Cross to form a non-religious slab or obelisk." App. 8a n.7. (internal quotation marks and citation omitted).

Other similarly-situated memorials across the nation important to veterans will also be at risk if the decision below is not reversed. For, example, the Joan of Arc memorial in Portland, Oregon, was dedicated on Memorial Day in 1925 in honor of the Doughboys of World War I and is administered by the City of Portland. *See* Smithsonian Art Inventories Catalog, Joan of Arc, Maiden of Orleans, (sculpture), available at https://siris-artinventories.si.edu/ipac20/ipac.jsp?&profile=all&source=~!siartinventories&uri=full=3100001~!16997~!0#focus (last visited Dec. 18, 2018). Under the Fourth Circuit's logic, this veterans memorial could be seen as an endorsement of the Roman Catholic faith because Joan of Arc is a revered Catholic saint.

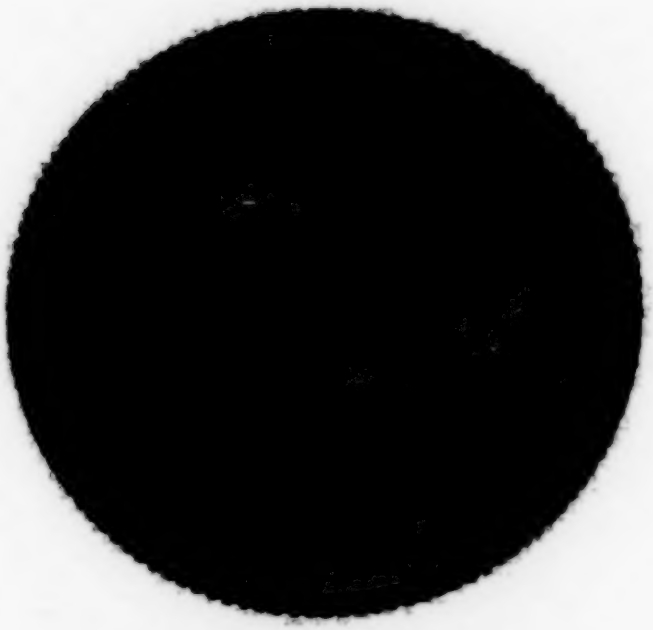


The World Trade Center Cross, which became a "symbol of hope and healing" after 9/11 may also be subject to future litigation. *Am. Atheists, Inc. v. Port Auth.*, 760 F.3d 227, 233–35 (2d Cir. 2014). Although not a veterans memorial, the monument honors first responders (and innocent civilians) who lost their lives on September 11, 2011. Additionally, more than 20 veterans have been awarded the Medal of Honor during the Global War on Terror launched in response to the 9/11 attacks. *See* Nat'l Medal of Honor Museum, *War on Terror Medal of Honor Recipients* (Sept. 11, 2018), http://mohmuseum.org/war-on-

terror-medal-of-honor-recipients/ (last visited Dec. 18, 2018).

Picture of World Trade Center Cross

Other memorials also use secular symbols that could be mistaken for religious symbolism. *See, e.g.*, Fort Moultrie (Fort Sumter National Monument) Quarter, U.S. Mint, https://www.usmint.gov/coins/coin-medal-programs/america-the-beautiful-quarters/fort-moultrie (last visited Dec. 18, 2018) (memorial quarter including crescent, which is associated with Islam).



Picture of Fort Moultrie Quarter

The Fourth Circuit's decision weaponizes the Establishment Clause to tear down United States history. The Establishment Clause does not intend that. Leaving the Fourth Circuit's decision intact sends a chilling message of disrespect to veterans: "removal would [be] viewed by many as a sign of disrespect for the brave soldiers whom the cross was meant to honor." *Buono*, 559 U.S. 726 (Alito, J., concurring).

The Medal of Honor recipients have long promoted memorials and monuments because they

provide the public with spaces to remember and honor the heroism and sacrifices of veterans. Memorials are not stone statues but places where the stories of veterans live on for posterity. Veterans memorials play a crucial role in protecting and celebrating these stories by symbolizing and preserving this history. Contrary to the Fourth Circuit's findings, that secular message is the primary message sent by veterans memorials.

II. The Bladensburg Peace Cross Is Consistent with the Nation's Long History and Tradition of Honoring Veterans

A. The Peace Cross's History Should Have Raised the Bar for Establishment Clause Challenges

The Fourth Circuit's wooden analysis conflicts with the requirement "that the Establishment Clause must be interpreted by reference to historical practices and understandings." *Town of Greece*, 572 U.S. at 576 (internal quotation marks and citation omitted). Instead of giving deference to the history and longstanding role the Bladensburg Peace Cross plays in the local community, the panel majority used those factors to find an Establishment Clause violation. That approach is backwards and emphasizes why the Fourth Circuit should be reversed.

The Peace Cross's rich history and tradition should have insulated the monument from this type

of challenge, which comes 93 years after its dedication in 1925. The panel majority observed (with apparent dismay) that "*[o]ver the years*, memorial services [have] continued to occur *on a regular basis* at the Cross." App. 5a (emphasis added). The opinion also noted that adjacent to the Peace Cross is a plaque stating that the "crossroads *has become* a place for communities to commemorate their residents in service and in death." App. 6a-7a (emphasis added) (internal quotation marks and citation omitted). And the Peace Cross "has primarily hosted veteran-focused ceremonies." App. 20a.

Instead of recognizing this context, the Fourth Circuit ignored the Peace Cross's 93-year history and even suggested this history implied longstanding harms to be remedied: "It is also true that the Cross has stood unchallenged for [over] 90 years . . . . Perhaps the longer a violation persists, the greater the affront to those offended. The Cross's history therefore does not definitively aid either side in the analysis." App. 20a-21a. That is not this Court's standard.

Instead, this Court has explained that a long historical practice weighs ***against*** finding an Establishment Clause violation. For example, in *Van Orden v. Perry*, this Court found that the extensive history of the Ten Commandments in the United States supported the constitutionality of the monument at issue, which had been in place for 40 years before Van Orden filed suit. 545 U.S. at 682,

688-90; *see also Buono*, 559 U.S. at 716 (finding that due to its 70-year history, "the cross and the cause it commemorated had become entwined in the public consciousness"). Similarly, in *Town of Greece v. Galloway*, this Court emphasized the long history of legislative prayer, which had been practiced by Congress since the framing of the Constitution, in upholding Greece's prayer practice, explicitly rejecting any legal test "that would sweep away what has so long been settled." 572 U.S. at 575-76. The Fourth Circuit, therefore, should have viewed the Peace Cross's 93-year history as a factor in its favor.

B. The Peace Cross Is a Secular Display, Consistent with Other Military Memorials and Honors that Use Cross Symbols.

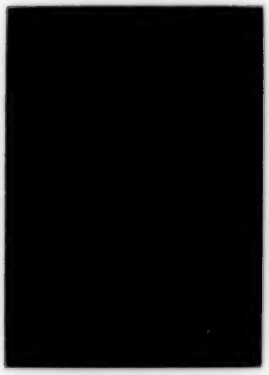
The Fourth Circuit's conclusion that "the sectarian elements [of the Peace Cross] easily overwhelm the secular ones," App. 22a, ignores the prominent role religious symbols have historically played in military memorials and honors. Those symbols are not present to endorse one religion but as signs of solemnity and respect. When used in the military context, these symbols are overwhelmingly secular.

From 1919 until 1942, *i.e.*, the period in which the Bladensburg Peace Cross was constructed and then stood for almost two decades after, one of the

Medals of Honor awarded for certain acts of heroism in naval services was in the shape of a cross:

See Types of MoH, Congressional Medal of Honor Society, http://www.cmohs.org/medal-types.php (last visited Dec. 18, 2018).

The Distinguished Service Cross, the second-highest award for valor bestowed on a solider, was established by President Wilson in 1918. To this day, the award is a "[b]ronze cross suspended from a red, white, and blue ribbon. An eagle rests in the center of the cross. Below the eagle, a scroll bears the inscription 'FOR VALOR.'"

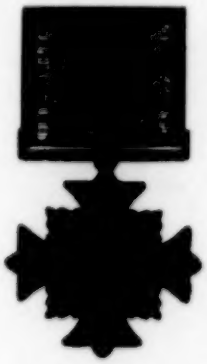


See National Museum of American History, Distinguished Service Cross Medal, http://americanhistory.si.edu/collections/search/object/nmah_447533 (last visited Dec. 18, 2018).

The Navy's second-highest honor is the Navy Cross:

Military Awards for Valor – Top 3: Description of Medals, U.S. Dep't Defense, https://valor.defense.gov/description-of-awards/ (last visited Dec. 18, 2018).

Likewise, the Air Force awards the Distinguished Flying Cross:



Id.; Barry L. Spink, *Distinguished Flying Cross and Air Medal Criteria in the Army Air Forces in World War II*, Air Force Historical Research Agency (Mar. 4, 2010), http://www.afhra.af.mil/Portals/16/documents/Timelines/World%20War%20II/WWIIDFCandAirMedalCriteriaChronological.pdf?ver=2016-09-16-111147-907 (last visited Dec. 18, 2018); *Distinguished Flying Cross*, Air Force's Personnel Center (Aug. 4, 2010), http://www.afpc.af.mil/About/Fact-Sheets/Display/Article/421931/distinguished-flying-cross/ (last visited Dec. 18, 2018).

Crosses are not the only religious symbols that appear in military honors. For example, the five-pointed star used in the Bronze Star and Silver Star utilizes a shape that is also a symbol of the Wiccan faith. *See generally McFaul v. Valenzuela*, 684 F.3d 564, 569-70 (5th Cir. 2012) (discussing the use of a pentagram in connection with the Wiccan religion); *McAlister v. Livingston*, 348 F. App'x 923, 926-27 (5th Cir. 2009); *Gelford v. Frank*, 310 F. App'x 887, 888 (7th Cir. 2008). Known as a pentagram, the five-pointed star is akin to the use of a cross by Christians, and some have claimed that the pentagram also represents the five wounds of Jesus in Christianity. *The Surprising Story Behind the Pentagram*, Universal Life Church (Oct. 10, 2017), http://www.universallifechurch.org/2017/10/10/the-surprising-story-behind-the-pentagram/ (last visited Dec. 18, 2018).

Similarly, a red cross on a white background (*i.e.*, the international symbol of the Red Cross) has historically been used as the symbol for medical services during wartime. *See* International Committee of Red Cross, The History of the Emblems, https://www.icrc.org/en/doc/resources/documents/misc/emblem-history.htm (last visited Dec. 18, 2018).

The Fourth Circuit's conclusion "that the historical meaning and physical setting of the [Peace Cross] overshadows its secular elements" thus ignores the role religious symbols have long played in military honors. App. 24a. It is an ahistorical approach that

invites all manner of frivolous Establishment Clause challenges to military memorials and regalia. Viewed through the lens of history, the Peace Cross should have been recognized for what it is—a veterans memorial—and accordingly found to be a secular display.

CONCLUSION

For the reasons set forth above, and in the briefs of the American Legion and Maryland-National Capital Park and Planning Commission, the judgment of the Fourth Circuit should be reversed.

Respectfully submitted,

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